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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GABRIEL VIZUET RODRIGUEZ, Defendant and Appellant.	G051143 (Super. Ct. No. 13WF3704) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Affirmed.

Mark Alan Hart, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Brendon W. Marshall and Alan Amann, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Gabriel Vizuet Rodriguez challenges his convictions for five counts of committing a lewd act against a child, on two grounds. First, defendant argues that the trial court erred in admitting statements he had made to the police in two interviews. The first interview occurred before defendant was read his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). The second interview occurred several hours after he was arrested, and after he was read his *Miranda* rights. Substantial evidence supports the trial court's findings that defendant was not in custody when the first interview was conducted, and that he later waived his *Miranda* rights and voluntarily made his statements. Under the totality of the circumstances, we conclude that the trial court properly admitted defendant's statements at trial.

Second, defendant argues that the trial court should have declared a mistrial, based on the prosecutor's closing argument. We conclude the argument was not improper, and that, in any event, the trial court's admonition to the jury was sufficient to cure any prejudice to defendant.

Therefore, we affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Because of the nature of the issues raised by defendant on appeal, we need not discuss in detail the facts of the crimes with which defendant was charged. Defendant was accused of committing lewd acts against his wife's three granddaughters (the victims), when the victims were between six and eight years of age.

Defendant was charged in an information with five counts of committing a lewd act on a child under age 14. (Pen. Code, § 288, subd. (a).) As to each count, the information alleged (1) substantial sexual conduct had occurred (*id.*, § 1203.066, subd. (a)(8)); (2) defendant committed an offense against more than one victim (*id.*, § 667.61, subds. (b) & (e)(5)); and (3) the victims were minors when the crimes were

committed, and had not yet reached age 28 at the time the prosecution commenced (*id.*, § 801.1, subd. (a)). A jury found defendant guilty of all counts, and found each allegation to be true.

The trial court sentenced defendant to five consecutive, indeterminate terms of 15 years to life. Defendant filed a timely notice of appeal.

DISCUSSION

I.

THE TRIAL COURT CORRECTLY FOUND DEFENDANT HAD WAIVED HIS RIGHTS UNDER MIRANDA, *AND PROPERLY ADMITTED THE STATEMENTS HE HAD MADE TO THE POLICE*.

On December 2, 2013, defendant was interviewed by Officer Carlos Diaz and Detective Michelle Bradbury of the Costa Mesa Police Department. The interview took place in an interview room at the police station; defendant voluntarily went to the station after Bradbury told defendant's wife that he had been a victim of credit card fraud.

When defendant arrived at the station, Diaz greeted him in Spanish. (Defendant speaks only Spanish; Diaz is a certified Spanish speaker.) Diaz explained that he and Bradbury wanted to talk to defendant about something that happened "in the past." Diaz assured defendant that even though the door was closed for privacy, it was not locked; defendant was not under arrest; he was free to leave at any time; and he did not have to talk to them. Defendant stated that he understood. Defendant had clear access to the door in the interview room. Both officers were wearing plainclothes, and were seated across from defendant at a table. The tone during the interview was conversational, and the officers never raised their voices.

During the first interview, which lasted a little over an hour, defendant repeatedly denied sexually molesting the victims. Bradbury (via Diaz's translation) told defendant that he would not have been called to the station if they did not know what had happened, suggested to defendant that he was not being truthful, and asked him to explain

why his DNA had been found on the body of one of the victims. Defendant admitted digitally penetrating one of the victims when she was 12 years old, but claimed she had forced his hand onto her vagina and he only briefly penetrated her when she asked him to.

Bradbury thanked defendant for being honest, but insisted that he had also orally copulated one of the victims, reminded him that the police had DNA evidence connecting defendant to the crimes, and stated, "[s]cience doesn't lie" (italics omitted). After multiple denials, defendant admitted orally copulating one of the victims. Defendant claimed that the victim climbed on top of him, sat on his face, and told him to orally copulate her. Defendant also admitted, after initially denying it, that the victim had orally copulated him. Again, however, defendant claimed the victim had done so of her own accord, and against his protests.

Following that interview, defendant was arrested. About nine hours later, defendant was interviewed a second time by Bradbury and Diaz. Before the second interview began, Diaz advised defendant of his rights under *Miranda*. Diaz did not ask defendant to expressly waive his rights, as he was confident that defendant understood them. Diaz believed defendant had impliedly waived his rights by answering Diaz's questions after being read his rights. During the second interview, defendant repeated his earlier statements that sexual conduct had occurred between him and one of the victims, but that she had initiated all of it. Defendant denied touching two of the victims.

Before trial, defendant filed a motion to suppress his statements from both police interviews. Defendant claimed the first interview was a custodial interrogation conducted in violation of *Miranda* because he had not been read his rights. Defendant also argued the statements from his second interview must be suppressed because the officers engaged in an improper two-step interview in violation of *Missouri v. Seibert* (2004) 542 U.S. 600 (*Seibert*). The trial court conducted a hearing, at which a forensic clinical psychologist and neuropsychologist testified that because of defendant's low

intelligence quotient and cognitive defects, he was not able to make a knowing, intelligent, and voluntary waiver of his *Miranda* rights.

The trial court denied defendant's motion. The court found that defendant was not in custody during the first interview, and that defendant's statements during the interviews were voluntary. The court admitted defendant's statements from both interviews.

"'The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment.'" (*People v. Maury* (2003) 30 Cal.4th 342, 384.) In considering a motion to suppress evidence, the trial court "is vested with the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences in deciding whether a search is constitutionally unreasonable. [Citation.]" (*People v. Woods* (1999) 21 Cal.4th 668, 673.)

The trial court's factual finding that defendant was not in custody during the first interview is supported by substantial evidence. The tone of the interview was conversational and the trial court, which had read all the transcripts and listened to pertinent parts of the audiotape of the interview, stated that the tone was civil and respectful, and that the officers did not raise their voices. The officers initially informed defendant he was not under arrest, did not have to talk to them, and was free to leave at any time. Although the door to the interview room was closed, the officers informed defendant it was not locked, and was closed only to protect his privacy. While the interview took place at the police station, defendant had voluntarily gone to the station, in response to Bradbury's legal ruse. The officers were in plainclothes, were not displaying weapons or handcuffs, and did not threaten to arrest defendant during the interview; he was arrested only after the first interview concluded. Under the totality of the

circumstances, we conclude a reasonable person in defendant's position would not have believed he was in police custody. (*Yarborough v. Alvarado* (2004) 541 U.S. 652, 663; *People v. Moore* (2011) 51 Cal.4th 386, 395.)[1]

The trial court's factual finding that the confessions were made voluntarily was also supported by substantial evidence. To determine whether a confession was voluntary, a court must consider whether the defendant's will was overborne at the time he or she confessed. (*In re Joseph H.* (2015) 237 Cal.App.4th 517, 534.) The court may look for threats or violence, express or implied promises, or the exertion of any improper influence. (*Ibid.*) In this case, the officers did not threaten defendant with violence or with arrest; did not make him any promises; and did not exert any improper influence over him. The officers falsely told defendant that they had obtained evidence of his DNA on one of the victims, but such actions are not prohibited and do not necessarily render a subsequent confession involuntary. "'Lies told by the police to a suspect under questioning can affect the voluntariness of an ensuing confession, but they are not per se sufficient to make it involuntary.' [Citations.] Where the deception is not of a type reasonably likely to procure an untrue statement, a finding of involuntariness is unwarranted. [Citation.]" (*People v. Farnam* (2002) 28 Cal.4th 107, 182 [police lies about the defendant's fingerprints being found on wallet of individual he robbed and assaulted did not make the defendant's confession to the crimes involuntary].)

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[1] Our conclusion is not inconsistent with, but indeed is supported by, Judge Fletcher's dissent from the denial of rehearing en banc in *Smith v. Clark* (9th Cir. 2015) 804 F.3d 983. Judge Fletcher's dissent emphasizes that a police officer's statement that the suspect is not under arrest is only one element to be considered in the totality of the circumstances to determine whether the suspect is in custody. (*Id.* at pp. 983-991 (Fletcher, J., dis. from denial of rehg. en banc).) As explained *ante*, in the present case, the trial court considered the totality of the circumstances, and the police officer's statement that defendant was not under arrest was one of many circumstances supporting the trial court's conclusion that defendant was not subject to a custodial interrogation.

Defendant contends his confessions were involuntary because of his low intelligence quotient and cognitive disabilities. Substantial evidence also supports the trial court's rejection of this contention. (*People v. Watson* (1977) 75 Cal.App.3d 384, 396-397 [neither mental illness nor below normal intelligence makes a defendant incapable of waiving his or her rights knowingly, intelligently, and voluntarily].) Defendant offered the testimony of an expert witness who opined that defendant did not effectively waive his *Miranda* rights. The trial court, however, found that there was sufficient evidence of defendant's ability to process and understand information despite his intellectual deficits. This evidence included defendant's specific, detailed statements regarding the acts of molestation, and his mitigating statements about his level of responsibility for the victims.

Finally, defendant argues that the officers used a two-step interview tactic that is prohibited by *Seibert*, *supra*, 542 U.S. 600. If police officers intentionally and deliberately fail to provide *Miranda* warnings and conduct a custodial interrogation of a suspect until a confession is produced, then immediately provide *Miranda* warnings and conduct a second interrogation designed to produce the same confession, the second confession is inadmissible. (*Id.* at p. 617 (plur. opn. of Souter, J.); *id.* at p. 622 (conc. opn. of Kennedy, J.).) However, defendant did not offer any evidence at the hearing suggesting Bradbury or Diaz engaged in a deliberate two-step interrogation in order to circumvent *Miranda*. As explained *ante*, the trial court properly found the first interview was not a custodial interrogation. The court also found that the officers did not use coercive methods during either of the interviews. Further, because there was a gap of time of about nine hours between the two interviews, defendant was able to "distinguish the two contexts and appreciate that the interrogation ha[d] taken a new turn." (*Seibert*, *supra*, at p. 622 (conc. opn. of Kennedy, J.).)

The trial court did not err in admitting defendant's statements from his two police interviews.

II.

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR MISTRIAL.

The jury was instructed with a special instruction, based in part on CALCRIM No. 1191, regarding evidence of charged sex offenses as follows: "The People presented evidence that the defendant committed the charged offenses. These offenses are defined for you elsewhere in these instructions. [¶] The People must prove each of the charged offenses beyond a reasonable doubt. If you decide that the defendant committed any one or more of the charged offenses, you may but are not required to conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses and, based on that decision, also conclude that the defendant was likely to commit and did commit any of the other charged offenses. [¶] If you conclude that the defendant committed any one or more of the charged offenses, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of any of the other charged offenses. The People must still prove each charge beyond a reasonable doubt."[2]

The prosecutor referenced this instruction in closing argument, and defendant's counsel objected:

"[The prosecutor]: [¶] . . . [¶] Propensity evidence. Very few times in criminal law are we allowed to say, 'because you did it once, you did it again.' If somebody steals you can't say, 'because you stole once, you stole again. Because you used drugs, you don't use them again.' It doesn't work that way. The two exceptions [are] sexual assault cases and domestic violence. The recidivism is so high in those cases—

[2] This instruction correctly states the law, as set forth in *People v. Villatoro* (2012) 54 Cal.4th 1152, 1167-1169.

"[Defendant's counsel]: Objection. Lacks foundation. Facts not in evidence. Improper argument. Move to strike.

"The Court: As to domestic violence, sustained. Overruled as to the remaining.

"[The prosecutor]: As to sexual assault cases, the legislature has determined the recidivism is high and you are allowed to use it. You, the jury, are allowed to use it.

"[Defendant's counsel]: Same objection. Facts not in evidence. Move to strike.

"The Court: Overruled.

"[The prosecutor]: So based on that, in sexual assault cases specifically, you get to say that if you find the defendant guilty of a charged count of lewd conduct on a child beyond a reasonable doubt, you may conclude that that person was disposed or inclined to commit sexual offenses. You get to say that. Once you find that he's committed one count against one person, you get to say he's inclined to commit another count. [¶] Based on that decision, you can conclude that he's likely to commit and did commit any other charged offense."

Outside the jury's presence, defendant's counsel moved for a mistrial based on the prosecutor's argument. The trial court denied the motion, but when the jury returned, the court admonished it as follows: "One thing I want to mention to you. When the prosecutor was giving her closing argument, she had referenced—made a reference to the legislature and propensity evidence and why that type of evidence is permitted to come into a trial such as this. And there was a discussion as to what the legislature was thinking when they did that. [¶] The admonishment I want to give to you is you should not—follow the jury instructions I've given you, you know, one of those instructions talked about not speculating. We talked about that a lot. You should not consider for any purpose whatsoever why the legislature does what it does, as it relates to

this particular case. [¶] We have our three branches of government that we talked about in our jury selection. Legislature is the one that makes the laws. We don't make the laws. We don't get into the legislative intent, unless the legislative intent becomes an issue. That is not an issue for you and you should not be considering that portion as to what they were thinking and why for any purpose."

"A trial court should grant a motion for mistrial 'only when "'a party's chances of receiving a fair trial have been irreparably damaged'"' [citation]." (*People v. Avila* (2006) 38 Cal.4th 491, 573.) We review the denial of a motion for mistrial for an abuse of discretion. (*People v. Bolden* (2002) 29 Cal.4th 515, 555.)

Defendant argues that the prosecutor's use of the word "recidivism" meant that the jury could have inferred from the prosecutor's argument that defendant would molest other children, if acquitted. We note that this was not the argument advanced by defendant's trial counsel, who requested a mistrial because there was no evidence of recidivism rates for sexual assault cases or of the legislative intent behind CALCRIM No. 1191.

However, the trial court admonished the jury to follow its instructions and, we presume that the jury followed the trial court's admonishment. (*People v. Avila, supra*, 38 Cal.4th at p. 575.) The trial court's admonishment about the prosecutor's closing argument addressed the problem and the instructions were correct. While defendant offers many general statements about the inability of a juror to forget what he or she has heard, defendant has failed to show how *this* jury would have been unable to disregard the portion of the prosecutor's complained-of argument, in light of the trial court's admonition and instructions. We conclude the trial court did not err in denying the motion for a mistrial.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.